



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

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James E. Trainor, III, Esq.
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401 West 15th Street, Suite 845
Austin, Texas 78701

Dear Messrs. Nixon, Oldham, and Trainor:

This refers to the 2011 redistricting plans for the commissioners court, justice of the peace, and constable, for Nueces County, Texas submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your response to our November 28, 2011 request for additional information on December 9, 2011.

With respect to the justice of the peace and constable redistricting plan, the Attorney General does not interpose an objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. 51.41.

With respect to the commissioners court redistricting plan, we have carefully considered the information you have provided, as well as census data, comments and information from other interested parties, and other information, including the county's previous submissions. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color or membership in a language minority group. *Georgia v. United States*, 411 U.S. 526 (1973); 28 C.F.R. 51.52(c). For the reasons discussed below, I cannot conclude that the county's burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I object to the 2011 redistricting plan for commissioners court.

The commissioners court is made up of four commissioners elected from single-member precincts, and a county judge, who is elected at large. According to the 2010 Census, the county has a total population of 340,223 persons, of whom 206,293 (60.6%) are Hispanic, and a voting-

age population of 251,968 persons, of whom 142,995 (56.8%) are Hispanic. Based on the 2010 and 2000 Census data, the Hispanic population in Nueces County increased by 17.9 percent, and the Hispanic voting-age population in the county increased by 21.9 percent, over the past decade. The Anglo population in Nueces County decreased by 5.3 percent, and the Anglo voting-age population decreased by 0.5 percent, during that same period.

With respect to the county's ability to demonstrate that the plan was adopted without a prohibited purpose, the starting point of our analysis is the framework established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). There, the Court provided a non-exhaustive list of factors that bear on the determination of discriminatory purpose, including the impact of the action on minority groups; the historical background of the action; the sequence of events leading up to the action or decision; the legislative or administrative history regarding the action; departures from normal procedures; and evidence that the decision-maker ignored factors it has otherwise considered important or controlling in similar decisions. *Id.* at 266-68.

Based on our analysis of the evidence, we have concluded that the county has not met its burden of showing that the proposed plan was adopted with no discriminatory purpose. The county's redistricting history reveals a distinct pattern with regard to Precinct 1. In 1991, the county increased the Hispanic population percentage in Precinct 1 by removing Voting District ("VTD") 63, in which Anglos were a significant majority of the registered voters; the Anglo incumbent in Precinct 1 at that time correctly predicted that the resulting increase in Hispanic population percentage would result in his inability to get re-elected. Ten years later, the county also removed VTD 42, which had similar population and registered voter characteristics to VTD 63, from Precinct 1. In each instance, the majority-Anglo VTD was placed in Precinct 3, where, because of the higher Hispanic population percentage, the potential effect on Hispanic voters would be minimized. The consequence of these changes was that Hispanic-preferred candidates were successfully elected to the commissioners court from Precinct 1 in each election from 1992 until 2008. In 2008, the Hispanic incumbent, despite strong support from Precinct 1's Hispanic voters, narrowly lost to an Anglo challenger, by a margin of 50.4 to 49.6 percent. As a result of that election, the commissioners court was transformed from one in which Hispanic-preferred candidates held three of the five seats to one in which Anglo-preferred candidates held three of the five seats.

During the 2011 redistricting cycle, the county departed from its normal procedure with regard to its treatment of Hispanic voters in Precinct 1, and moved the predominantly Anglo and high-turnout VTDs 42 and 63 from Precinct 3 back to Precinct 1. The county then exacerbated the effect of those moves by cutting VTD 61, where Hispanics constitute a majority of the registered voters, out of Precinct 1 and adding it to Precinct 3. The net result of these VTD swaps was to reduce Hispanic electoral ability in Precinct 1. These changes were particularly noteworthy because, according to the 2010 Census, Precinct 1 already complied with the Federal Constitution's "one-person, one-vote" rule, so there was no need to add population to, or remove population from, that precinct.

These changes were opposed by Hispanic commissioners and other Nueces County citizens on the ground that they would diminish Hispanic electoral ability. Precinct 3

Commissioner Oscar Ortiz specifically requested that VTDs 42 and 63 be left in his district, and Precinct 2 Commissioner Joe Gonzalez, as well as other minority residents, repeatedly voiced their concerns about these moves. The record is devoid of any response to these requests or concerns.

Despite the vocal opposition from these commissioners and other citizens to the Precinct 1 changes, and despite the effect of those changes on the ability of Hispanic citizens in Precinct 1 to elect their preferred candidates, the county has offered no plausible nondiscriminatory justification for the changes. Instead, the county has offered shifting explanations for the changes. When the proposed redistricting plan was announced for public comment on May 25, 2011, county officials first explained that the changes in the proposed plan – including the decision to add VTDs 42 and 63 and remove VTD 61 from Precinct 1 – resulted from earlier discussions that the plan’s designers held individually with each commissioner. But none of the commissioners or the county judge has acknowledged requesting these changes to Precinct 1; instead, each has denied requesting or suggesting the Precinct 1 changes. The county subsequently informed us that the changes to Precinct 1, in fact, did not originate with the commissioners, but rather came from the plan’s designers.

The county later argued that the Precinct 1 changes were necessary to prevent any reduction in the Hispanic population percentage in Precinct 3. This statement cannot withstand scrutiny. Commissioner Ortiz presented an alternative plan at the June 15, 2011 public hearing that would have kept VTDs 42 and 63 in his district, Precinct 3, without diminishing Hispanic citizens’ ability to elect in either Precinct 3 or Precinct 1. The plan’s designers contended that the Ortiz alternative plan would face more scrutiny under the Voting Rights Act than the proposed plan because it had a larger population deviation (although within the constitutionally permissible range). This advice was incorrect: The Department of Justice Guidance Concerning Redistricting makes clear that “[t]he Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person one-vote principle,” 76 Fed. Reg. 7470, 7470 (Feb. 9, 2011), and therefore the Attorney General does not review plans for compliance with this requirement, and certainly does not demand population equality in excess of what the Constitution requires. The erroneous advice from the plan’s designers appears to have prevented any prolonged discussion by the commissioners court of the Ortiz alternative plan, and the request from Commissioners Ortiz and Gonzalez to delay a vote to provide for further public comment and discussion was denied.

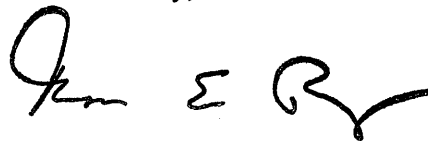
The redistricting process departed both procedurally and substantively from past redistricting cycles in other ways. In its 2011 redistricting, the county considered only one plan, and that plan was revised only once. This is in stark contrast to the redistricting process in both 2001 and 1991, when numerous alternative plans were presented by the county’s demographers and consultants for the commissioners court to consider. Previous redistricting procedures also included consultation and cooperation with local Hispanic residents and groups in drawing plans. This time, several of the commissioners and the plan’s designers engaged in a closed, secretive process, such that Hispanic residents and groups that had traditionally participated in redistricting were excluded from the development of the 2011 plan. Concerns raised by such individuals and groups at public hearings went unaddressed.

Many of the county's actions taken with regard to Precinct 1 during the redistricting process appear to have been undertaken to have an adverse impact on Hispanic voters. Given the history of Hispanic electoral success in Precinct 1, the county-wide growth in the Hispanic voting-age population and simultaneous drop in the Anglo voting-age population over the past decade, the county's shifting justifications for the changes to Precinct 1, the absence of a credible explanation for those changes, and the drop in Hispanic electoral ability that results from the Precinct 1 changes, there is sufficient evidence that prevents the county from meeting its burden of demonstrating that the proposed plan was not motivated by a discriminatory purpose prohibited by Section 5. *Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part), *cert. denied*, 498 U.S. 1028 (1991); *cf. LULAC v. Perry*, 548 U.S. 399, 428-29 (2006).

The county's failure to establish the absence of a discriminatory purpose is sufficient to warrant an objection to the commissioners court redistricting plan. We would note, however, that based on the facts as identified above, the county has also failed to carry its burden of showing that its proposed plan does not have a retrogressive effect on the ability of Hispanic voters to elect their candidate of choice.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the submitted change continues to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action Nueces County plans to take concerning this matter. If you have any questions, please contact Robert S. Berman (202/514-8690), a Deputy Chief in the Voting Section. Because the Section 5 status of the redistricting plan is before the court in *Nueces County v. United States*, No. 11-1784 (D.D.C.), we are providing a copy of this letter to the court and counsel of record in that case.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tom E. Perez', written in a cursive style.

Thomas E. Perez
Assistant Attorney General